Structuring Hospital Acquisitions of Physician Practices
Legal Issues in Valuing, Negotiating and Documenting the Transaction

THURSDAY, JANUARY 29, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

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Hospital Acquisitions of Physician Practices

January 29, 2015

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Summary

- Trends
- Typical Transaction Structures
- Critical Business Issues
Why are physicians selling?

- Jackson Healthcare survey (2013):
  - 42% didn’t want to deal with hassles of ownership
  - 32% want to concentrate on practicing medicine
  - 27% lacked capital to invest in a practice
- Reimbursement cuts
- Increasing cost of technology
Why are hospitals buying practices again?

- Secure referral base
- Revenue enhancement opportunities
  - Outpatient facility fees
  - Ancillary volume
- Clinical integration
- Competitive positioning vs. payors
Typical Transaction Structures
MSO Model

- Health Care System
- Hospital
- MSO
- Physician Practice
- Assets
- Management Services
Typical Transaction Structures

**MSO Model**

- MSO acquires tangible assets of the Physician Practice
- Physician Practice remains independent
- MSO provides turn-key management services to Physician Practice
  - Equipment
  - Physician extenders
  - Billing
  - Collections
  - Accounting
Typical Transaction Structures
MSO Model

- Purchase price limited to value of hard assets
- Physicians relieved of burdens of:
  - Capital investment
  - Administration of practice
- Physician Practice remains at risk for reimbursement and physician compensation
- MSO services must be provided at FMV
Typical Transaction Structures

Full Asset Purchase/Employment

Health Care System

Hospital

Clinic

Physician Practice

Assets

Employees

Transfer of Employees

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Transfer of Employees
Typical Transaction Structures

Full Asset Purchase/Employment

- Assets of Physician Practice are purchased by Health System Clinic at fair market value
- Physician employees, along with clinical and non-clinical staff, become employees of Health System Clinic
- Physician employees are compensated at fair market value in Stark Law compliant employment arrangements
Typical Transaction Structures

Asset Purchase/PSA Arrangement

Health Care System

Hospital

Clinic/Foundation

Physician Practice

Assets

Employees

PSA Compensation

Professional Services

Employees

PSA Compensation

Professional Services

Assets

Physician Practice

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Physic
Typical Transaction Structures

Asset Purchase/PSA Arrangement

- Assets of Physician Practice are purchased by Health System Clinic or Foundation at fair market value
- Clinical and non-clinical staff become employees of Health System Clinic or Foundation
- Physicians remain employed by Physician Practice and enter into a long-term professional services arrangement to provide professional medical services to Health System Clinic or Foundation for fair market value compensation, which may include a medico-administrative fee
- Health System Clinic or Foundation retains right to bill for physician services
- Clinic or Foundation operated as 501(c)(3) organization
Model works best in states where corporate practice of medicine is an issue

Physician relieved of burden of capital investment and administration of Physician Practice

Physicians remain responsible for their compensation (paid out of aggregate PSA compensation)
Typical Transaction Structures

Stock Purchase/Merger

Health Care System

- Hospital
- Clinic

MD Owners

Ownership Interests*
Purchase Price

Physician Clinic

*Can be structured as a stock purchase or merger
Typical Transaction Structures

Stock Purchase/Merger

- If possible, can be used to avoid double tax on physicians
- Also, can be used to avoid changes in licensure or assignment clauses
- Can be used in non-CPM states
Typical Transaction Structures
Real Estate Component

Health Care System
  Hospital
  Clinic

Real Estate Entity

MD Investors
Typical Transaction Structures
Real Estate Component

- Often, physicians will hold practice real estate in a separate entity
- Transactions often structured to allow physicians to retain real estate and enter into leases with Health System
- Current leases can be renegotiated to longer term arrangements
- Lease valuations often are advisable
Critical Business Issues

- Not repeating past mistakes:
  - Understand motivations
  - Don’t overpay
  - Align incentives
  - Hire managers with physician practice experience and let them manage
  - Avoid technology-induced stress
  - Understand big picture
Critical Business Issues

- Physician compensation models:
  - Very few “guaranteed” salary models (mistakes of the 80s/90s transactions)
  - Physicians generally compensated through production based models
    - Revenue \textit{minus} expenses
    - Base compensation \textit{plus} incentive compensation (incentive at risk)
    - Work relative value unit production (WRVUs allocated to CPTs)
    - Incentives for quality, good citizenship, etc.
  - Physician participation in ancillaries
  - Compensation must meet Stark Law exception
    - Fair market value a critical component
Critical Business Issues

- Transaction Issues
  - Purchase price
    - Consider tax consequences to physicians
    - Installment payments v. lump sum payment
  - No more “covenant light” deals
  - Certain percentage of “inked” physicians contracts as a condition to closing
  - Regulatory approvals
  - Indemnity escrows
Valuation Issues

- All regulatory analyses turn on FMV
- Formal valuations close the gap between perception and reality
- Most for-profit and tax exempt systems insist on third party valuations of physician practices
- Physician professional component generally has relatively low valuation
- Most value embedded in ancillary businesses that spin off cash flow (imaging, ASC, lab)
- Certain intangible assets have value
  - Workforce in place
  - Medical records
  - Trademarks and trade names
- Use of “stay bonuses”
- Payments for covenants not to compete
Critical Business/Legal Issues

- **Due Diligence**
  - Not uncommon to find physician practices with compliance issues
  - Avoids later problems
  - Possibility of self-disclosure
  - Indemnity escrows
Hospital Acquisitions of Physician Practices: Regulatory Issues

January 29, 2015

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Key Deal Maker/Breaker Issues

- Strategic Alignment
- Trust/Relative Trust
- Tax Structure
- Governance
- Other financial terms/Valuation (purchase price, comp, comp guarantees)
- Term/Duration
- Termination
- Restrictive Covenants/ROFOs
- Unwind Rights (if any)
- Break-Up Fees?
- Dispute Resolution
Regulatory Issues

- Federal Issues
  - Federal Anti-Kickback Statute
  - Stark Law
  - False Claims Act
  - Civil Monetary Penalty Law
  - Tax Exemption Issues
  - HIPAA
Regulatory Issues

- Select State Law Issues
  - State anti-kickback statutes
  - State Stark laws
  - Corporate practice of medicine
  - Fee splitting
  - Covenants not to compete
  - Clinic/facility licensure
  - Certificate of need
  - State privacy/security laws
  - Fiduciary issues
  - Physician licensure standards/professional ethics
Anti-Kickback Statute

- Prohibits knowing and willful offer or receipt of remuneration intended to induce or arrange for referrals of business paid for by Medicare/Medicaid programs
- Civil monetary and criminal penalties
  - CMP of $50,000 per violation
  - Criminal penalties: $25,000 per violation and/or up to 5 years in jail
  - Exclusion
Anti-Kickback Statute

- Any purpose test and problem of mixed motives
  - ACA § 6402(f)(2): violation does not require actual knowledge of AKS or specific intent to commit a violation
  - ACA § 6402(f)(1): claim for items or services resulting from AKS violation constitutes a false claim under the False Claims Act
- Safe harbors
- Advisory opinions not available on FMV
Anti-Kickback Statute

Is the purchase price a disguised kickback from the buyer (overpayment) or seller (underpayments) to induce post-deal referrals?

- Obligation to report overpayments within 60 days after (i) identification or (ii) the corresponding cost report is due, if applicable. 42 USC § 1320a-7k(d).
- Failure to timely refund overpayment is subject to FCA liability.
AKS and Practice Acquisitions

- Practice acquisition safe harbors
  - Practitioner-to-practitioner safe harbor
  - Practitioner-to-other entity (hospital) safe harbor
    - Practice acquired is located in a HPSA
    - Sale completion with 3 years
    - Seller not in a position to refer after sale completion
    - Purchaser must use diligent and good faith efforts to recruit a successor within 1 year to take over the practice
  - Most practice acquisitions are not safe-harbored

- Bona fide employment exception and safe harbor
AKS Valuation Issues

- Valuation Importance – independent appraisal of fair market value in arm’s-length transaction may negate adverse inference of improper intent.
- Fair market value means the value in arm’s-length transactions, consistent with the general market value.
- “General market value” means the price that an asset would bring as the result of bona fide bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, or the compensation that would be included in a service agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, on the date of acquisition of the asset or at the time of the service agreement. Usually, the fair market price is the price at which bona fide sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition, or the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement, where the price or compensation has not been determined in any manner that takes into account the volume or value of anticipated or actual referrals. 42 CFR § 411.351.
AKS Valuation Issues

- Legitimate business purpose and commercial reasonability
  - An arrangement will be considered commercially reasonable if the arrangement would make commercial sense if entered into by the parties even if there were no potential for referrals. See 69 Fed. Reg. 16093 (March 26, 2004).

- Goodwill – payment for intangibles to physician who continues in a position to refer is suspect (OIG letter to IRS (Dec. 22, 1992); OIG letter to AHA (Nov. 2, 1993))
  - General intangibles; covenants not to complete; exclusive dealing agreements; organized workforce in place, etc.
  - Professional v. practice level goodwill
  - No professional goodwill in absence of enforceable non-compete
  - No EBITDA, no goodwill/Trade-off of compensation and price?
AKS Valuation Issues

- Discounted free cash flow/discounted earnings approach may take into account the value of future anticipated cash flows (from selling physicians?)
  - See e.g., OIG Adv. Op. 09-09 (footnote 5) – contribution of ASCs to hospital-physician joint venture should not include intangibles valued on cash flow/going concern basis
  - See PharMerica settlement
  - Differences of opinion and approach
    - Hypothetical willing buyer/seller v. referrals from actual sellers
    - Blend with other valuation methods
    - Value on a “re-start” basis?
    - Carve-out governmental business (but, some state all-payor statutes)?
Anti-Kickback Statute Issues

- Other matters affecting value under income/DCF approach
  - Salary to selling physicians post-sale
  - “Stacking” other forms of compensation (e.g., sign-on bonus, retention bonus, relocation reimbursement, medical directorships, call/coverage stipends, teaching stipends, incentive payments)
  - Over-coding
  - Revenue growth assumptions
  - Deferred capital investments
  - Size of practice
  - Cost of capital/market multiple
Anti-Kickback Statute Issues

- Market Approach Valuation Issues: Need true comparables
  - Same specialty and mix of services?
  - Same market?
  - Same time period?
  - Same context?
  - Private vs. public company transactions
    - See Sta-Home Health Agency vs. Commissioner, Case No. 02-60912 (5th Cir. July 11, 2006) (Inappropriate market approach to valuation based on public company comparables for home care company with no invested capital and no history of profitable operations/no goodwill)
Anti-Kickback Statute Issues

Market Approach (con’t)
- Problem of tainted comparables
  - “Depending on the circumstances, the ‘volume or value’ restriction will preclude reliance on comparables that involve entities or physicians in a position to refer or generate business.” 66 Fed. Reg. at 944

Other Issues
- Earn-outs of sellers who remain in a position to refer
- Use of attorney-client privilege
- Valuator certifications and opinion duration
Stark Law

- Prohibits a physician who has a direct or indirect financial relationship with a DHS entity from referring patients to the DHS entity for "designated health services" for which payment may be made under the Medicare or Medicaid program; unless a specific exception applies
  - "Designated health services" includes **all inpatient and outpatient hospital services**, lab, imaging, pharmacy, DME, radiation therapy, PT, occupational and speech therapy, parenteral and enteral drugs, nutrients, and supplies, prosthetics, orthotics, and home health services
  - $15,000 civil monetary penalty assessed against physician for each prohibited referral
  - DHS entity must refund DHS billed pursuant to a prohibited referral;
  - Obligation to report overpayments within 60 days; failure to timely refund an overpayment may implicate FCA
  - $15,000 civil monetary penalty assessed against DHS entity for billing for service rendered pursuant to a prohibited referral, unless it can show that it did not have actual knowledge and did not act in reckless disregard or deliberate ignorance of the prohibited referral
  - $100,000 civil monetary penalty for circumvention schemes
  - Requirement to report to HHS financial relationships with physicians upon request; $10,000 penalty for failure to report
  - Potential exclusion
Stark Law

- Stark law – purchase price transaction creates financial relationship that will prohibit referrals to hospital buyer (or other DHS entity) unless an exception applies
  - Strict liability/Zero tolerance law
  - Stark analysis has changed with “stand in shoes” rule
    - Stock transactions – payment to physician (direct)
    - Asset transactions – payment to medical group (indirect)
      - Direct compensation exception needed for physician owners (other than titular owners) who stand in shoes
      - Direct or indirect compensation exception for titular owners and non-owners (e.g., employees)
Stark Law

- Principal **direct compensation** exception for practice acquisitions is **isolated transaction exception**
  - Compensation exception only (not applicable if stock, warrants, options or other investment interests are part of purchase consideration)
  - Isolated transaction standards:
    - Aggregate payments fixed in advance (no earn-outs)
    - Payable even if default by buyer (negotiable note or guaranteed by third party)
    - Security interest granted by buyer is an “investment interest” in buyer for which no exception may be available
Stark Law

- Isolated transaction exception standards (con’t)
  - FMV, not taking into account volume or value of referrals or other business generated between the parties
    - Similar to valuation issues under AKS if seller will continue to be in position to refer
    - Particularly acute if selling medical group provides DHS/ancillaries
    - Advisory opinions on fair market value not available
  - No other transactions for 6 months except:
    - Other Stark Law excepted transactions
    - Commercially reasonable post-closing adjustments

- **Indirect compensation** analysis for physician employees and titular owners of selling medical group
  - Purchase price must be FMV and not vary with v/v of referrals
Stark Law

- **U.S. vs. Bradford Regional Medical Center, et al., 752 F. Supp. 2d 602 (W.D. Pa 2010)**
  - Payment for non-compete from hospital to cardiology group in connection with sublease to hospital of nuclear medicine camera was found to violate Stark Law, notwithstanding fixed fee and independent appraisal of FMV
  - Court finds that appraisal method takes into account volume/value of anticipated referrals from cardiology group based on expected referrals in the absence of an interest in its own cardiac imaging service
  - $2.75 million settlement
  - Stresses importance of obtaining compliant FMV appraisal that does not take into account v/v of historic or anticipated referrals
Stark Law Issues

Other Stark Law Issues

- Sale of physician lab or DHS services – not permitted if price is based on anticipated post-transaction referrals by physician owners
- Installment sales – permitted if integral to transaction and payments guaranteed even if buyer defaults
  - Secured debt instrument treated as investment interest (isolated transaction exception does not apply)
- Investment interests in buyer (DHS entity)
  - Stock options and convertible securities issued as “compensation” are not investment interests
  - Investment interest exceptions for rural providers, and publicly traded securities
  - No small entity exception
Stark Law Issues

- Associated transactions (e.g., employment, consulting, lease agreements) must meet other Stark Law exceptions
  - Bona Fide Employment
    - Identifiable services
    - FMV and commercially reasonable
    - Not take into account v/v of DHS referrals
  - Personal services
  - Space rental or equipment rental
  - Fair market value
  - Indirect compensation

- All based on FMV: Increased scrutiny of excessive comp
Stark Law

  - Part-time employment agreements with 19 endoscopists found to violate Stark Law and FCA where compensation is 31% in excess of collections from personally performed services, and each service performed results in a facility fee payment to the Hospital
  - Employment in lieu of physicians opening own endoscopy center
  - Valuation obtained, but lacked documentation of basis of FMV opinion
  - Jury finds that compensation takes into account v/v of referrals for DHS; not just personally performed services
  - Treble damages under FCA of $237 million
Stark Law

- **US ex rel Kunz v. Halifax Hospital Medical Center**, 6:09-cv-1002-Orl-31 (D. Fla 2014)
  - Oncologists paid from a pool based on 15% of the operating margin of Hospital’s oncology service line; allocated based on personally performed services
  - Valuation showed that at least one oncologist’s comp was in excess of FMV
  - Court found that comp varied with v/v of DHS referrals b/c pool was based on service line operating margin
  - $85 million settlement

- Other excessive comp cases
Stark Law

- Burden of proof is on defendant
  - Violations are not remedied until referring physician/DHS entity repays excess compensation or arrangement is terminated
  - Failure to timely repay overpayment may give rise to FCA liability
Tax Exemption Considerations

- 501(c)(3) Exemption Standards
  - No inurement
  - Not more than incidental private benefit

- Revocation authority and intermediate sanctions (IRC § 4958)
  - Recoupment of “excess benefits” and excise taxes
  - Modern Health Care Services (d/b/a LAC Facilities)
    94 TNT 216-38 (Nov. 3, 1994) – revocation for purchase of practice of “insiders” for excessive price and re-acquisition at bargain price
Tax Exemption Considerations

- **Carracci (Sta-Home) case** – proposed revocation and intermediate sanctions overturned due to IRS valuation errors
  - Sale of 3 exempt home health agencies operated at loss for 7 years (97% of revenue is cost based Medicare reimbursement)
  - 2 appraisals find zero value
  - IRS values at $18.5 million and seeks $256 million in excise taxes and revocation of exemption
  - Taxpayer wins due to shift in burden of proof to IRS based on IRS error in assigning value to intangibles in the absence of profits
Tax Exemption Considerations

- Lessons of **Carracci** Case
  - Select a qualified appraiser
  - Properly take into account third party payor methodologies and rates
  - No EBITDA = No Goodwill
  - Burden of proof is frequently dispositive
  - Don’t count on IRS blunders: follow process for rebuttable presumption of reasonableness (to shift the burden to the IRS to establish that your appraised value is incorrect)
Tax Exemption Considerations

- Rebuttable presumption process under intermediate sanctions regulations (Treas. Reg. § 53.4958-6)
  - Approved by board or committee with no conflict of interest
  - Rely on appropriate data as to comparability
  - Determine that the property transfer is at FMV
  - Document basis of decision within 60 days after decision
Tax Exemption Considerations

Other Exemption issues/cases

- Charitable deduction for donation of assets with value in excess of benefits received/Penalties for valuation misstatements (IRC § 6662)
- Derby case, T.C.M. 2008-45 (Feb. 28, 2008) (Disallowance of claimed charitable contribution to Sutter Medical Foundation by physicians associated with Sutter West Medical Group)
  - Taxpayer could not meet burden of proving that charitable deduction was not offset by benefits received by physicians
- Bergquist case, 131 T.C. 2 (July 22, 2008) (Tax court reduces charitable deduction of $401.79/share to $37/share for contribution of PC stock, and imposes valuation misstatement penalties)
  - Taxpayer erred by attributing on-going business value to anesthesia practice going out of business
Regulatory Compliance

Advice

- Document proper purpose of acquisition: community benefit
- Disclaim improper purpose: induce referrals
- No evidence of improper purpose
- Independent appraisal of FMV
- If sellers will continue in position to refer, valuation method cannot take into account future referrals by sellers
  - Goodwill value generally cannot be recognized in the absence of EBITDA and an enforceable non-compete
  - Cannot value unenforceable non-competes (e.g., MA)
  - Cannot value DHSs on basis that takes into account v/v of future referrals
- Avoid earn-outs, but installment sales permitted
- Avoid exclusive use agreements
Regulatory Compliance

- Advice re: Independent Appraisal of FMV
  - Select knowledgeable appraiser who has experience with medical practice valuations and is sensitive to health regulatory issues
  - Diligence appraisal for health regulatory compliance
  - Obtain compliance certification from appraiser, to the extent possible
  - Make sure valuation takes into account all aspects of benefits received by sellers in transaction documents
  - Rely on true market comparables
  - Do not use going concern value (income or market approach) for practice that is otherwise going out-of-business
Advice re: Tax Exemption

- Follow steps for rebuttable presumption of reasonableness if buyer is a tax-exempt entity
- Properly value any assets contributed to exempt organization for charitable deduction purposes

  Assure that charitable deduction is reduced by value of any benefits received by “seller” in connection with donation